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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 290.

WINTON M. BLOUNT, Postmaster General,
Petitioner,

v.

UNITED FEDERATION OF POSTAL CLERKS, AFL-CIO, et al.

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Respondents ask that the petition for a writ of certiorari filed herein be denied.[1]

## RESTATEMENT OF QUESTION PRESENTED.[2]

Whether the provisions of the Federal Employees Salary Comparability Act of 1965 requiring the Postmaster

[1] References to the Petition, which includes in Appendix A the decision of the Court of Appeals, will be shown in Respondents' Brief by the following abbreviation "Pet. p. ...".

[2] The reason we cannot agree with the Petitioner's "Question Presented" is that it departs from his position in the Court of Appeals where he stated the question to be:

> "Whether the 'temporary change' of appellant Groettum's basic workweek assignment in June 1966, was within the lawful discretionary authority of the Postmaster General."

General to establish regular work schedules for annual rate employees consisting of five eight-hour days in each week, also required the Postmaster General to adhere to such regular work schedules and pay the statutory wages, or whether he may establish such work schedules and then "temporarily" abandon such schedules and unlawfully require an employee to stay away from work on some of his regular days and work on off days without the payment for such off days at the overtime rate, with the result that the Postmaster General is following a practice abolished by Congress of working employees on off days and compensating for such work only with compensatory time off.

## STATEMENT.

Congress in the Federal Employees Comparability Act of 1965 (hereinafter referred to as "the Act") corrected earlier Acts of Congress which had for many years permitted the Postmaster General to work postal employees on Saturday and Sunday and to pay for it by allowing time off during the next five days on a hour for hour basis. This was known in the repealed statute as compensatory time, or compensatory time off.[3] Thus twenty years after the Federal Employees Pay Act of 1945, which gave overtime benefits to most of the employees in the competitive Civil Service, the Postal Employees were, at last, placed more equally in line with employees in the public and private sectors.[4]

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[3] 39 U. S. C. (1964 ed.) 3573.

[4] The extensive record of the Hearings before the Senate and House Committees included tables reflecting the practice of industry of providing regular five day work weeks which were enforced by requiring overtime payments for hours over 40 or, for the 6th and 7th days worked as such, or premiums paid for work on off days (Attachment to letter of Secretary of Labor Wirtz, pp. 225-232—Hearings before the Committee on Post Office and Civil Service, United States Senate, 89th Congress, First Session on Federal Pay Legislation; Hearings before Sub-

The new law was carefully tailored to the needs of the Postal Service. Under it the Postmaster General first established a "service week" consisting of seven days running from Saturday through Friday. Within this period he was required to, and did establish, for annual rate regulars, basic work weeks, in advance, consisting of work schedules of five eight-hour days. The Postmaster General, under the Act, may establish any pattern of five fixed work days and two days outside of the schedule. For the respondent Groettum, who had bid for and was assigned a regular schedule, the regular schedule was Monday through Friday and his two off days were the Saturday and Sunday which preceded his regular schedule, but within the same "service week" of seven days.[5]

The violation, in simple terms, as to respondent Groettum took place in this fashion. On Thursday, June 16, 1966, he was told by the Postmaster to come in and work on his two off days, i. e. Saturday and Sunday, and to stay away on the following Monday and Friday. He was paid only the equivalent of his regular pay for the period. The pay received and the effect of the practice followed are identical with the outlawed practice of granting com-

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committee on Compensation, Committee on Post Office and Civil Service, House of Representatives, First Session on H. R. 8307 and similar bills July 19, 1965; S. Rep. No. 910, 89th Cong., 1st Sess., p. 5).

[5] The Postmaster General in consultation with the postal unions worked out an elaborate system for determining types of scheduled workweeks to meet the needs of the postal service, for posting these schedules and receiving bids and for making official assignments (Postal Bulletin No. 20520, Mar. 4, 1966, being Exhibit D, attached to the complaint and excerpted pp. 42-47 of the Joint Appendix). The Postmaster General then proceeded in the weeks following Mar. 4, 1966, to determine and officially assign regular work schedules to all of the employees in the Department. It was following this that the Petitioner issued instructions authorizing temporary changes in regular work schedules without payment of statutory wages. The facts as to Groettum are typical of the general practice affecting a large number of employees in the postal service.

pensatory time off on an hour-for-hour basis.[6] The Postmaster General failed to comply with the Act which required adherence to the established regular work schedule of Monday through Friday for respondent Groettum and the payment of 150 per centum of the hourly rate of basic compensation for the two off days.

The careful "tailoring" of the provisions of the Act is reflected throughout its language and particularly in the overtime provisions. Thus a "substitute" employee would be paid overtime only by working in excess of 40 hours; the same is true of "hourly" employees. However, for "annual rate regulars", overtime was not based on the concept of the number of hours worked, but whether the employee was required to work in excess of his regular work schedule.[7] From this bare statement of the law and the circumstances, it follows that the Court of Appeals was correct in its application of the law. The decision, however, reflects a careful weighing of the legislative history, the language of the Act and the pertinent facts.

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[6] The only exception to this under the old law was that during the month of December the statute required **"for work performed on Saturdays and Sundays" payment to an employee "at the rate of 150 per centum of his hourly basic compensation"** (39 U. S. C., 1964 ed. 3573).

[7] 39 U. S. C. 3573 as Amended:

"§ 3573. Compensatory time, overtime, and holidays

(a) In emergencies or if the needs of the service require, the Postmaster General may require employees to perform overtime work or to work on holidays. Overtime work is any work officially ordered or approved which is performed by—

(1) an annual rate regular employee in excess of his regular work schedule,

(2) an hourly rate regular employee in excess of eight hours in a day or forty hours in a week, and

(3) a substitute employee in excess of forty hours in a week."

## REASONS FOR DENYING THE PETITION.

The position advanced by the Petitioner in the Court of Appeals was that he could temporarily abandon a statutorily established regular work schedule and create a new statutory work schedule of five eight-hour days provided he applied the new schedule only on a "temporary" basis.[8] For obvious reasons the Petitioner has abandoned this position and substituted a confession and avoidance theory coupled with a plea for mercy. Admitting that he cannot lawfully change an employee's established regular work schedule on a "temporary" basis, he is now claiming that although he acted improperly in sending Groettum (and other employees) home on two regular work days this permits him now to assert "although I violated the obligation imposed by statute nevertheless the employee must actually work his regular schedule in order to bring into operation the overtime provisions of the Act which require extra pay for working on off days."

The flaw in Petitioner's position is that he fails to recognize that Congress anticipated and guarded against just such an approach, for, as the Court of Appeals points out, Congress chose different language to be applied to regularly scheduled annual rate employees (Pet. p. 17). Thus an annual rate regular is to be paid overtime for work in "excess of his regular work schedule" (Pet. p. 3), whereas substitutes and hourly rate regular employees receive overtime only for work in excess of forty hours in a week (Pet. p. 3). Although Petitioner does not spell

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[8] Postal Bulletin No. 20553—September 22, 1966 reads in part:

> "Temporary changes in hours and days of work shall not be made unless service needs at an installation preclude adherence to regular work schedules; such temporary changes shall be held to a minimum. Employees shall be given as much advance notice as possible of temporary work schedules, but in no case shall they be notified later than the end

out his new theory it is inherently based upon the assumption that while the law requires him to establish regular work schedules he is not bound, thereafter, while such regular schedules are in effect, to adhere to such schedules.[9] Whether under the Petitioner's old approach or his new, the result is the same. In the language of the Court of Appeals "If this procedure were legal, compensatory time was abolished in name only and the Post Office need never pay its annual wage regulars overtime for working on off days."

The decision below was correct and Petitioners have no merit in their present contention. This case does not present any new questions of law for this Court to determine. The well reasoned and unanimous decision of the Court of Appeals was based upon principles long established by this Court. The Postmaster General has no authority to rewrite the law as passed by Congress, nor to ask this Court to do so. **U. S. v. Gates**, 148 U. S. 134 (1893).[10] This Act, which was before the Court of Appeals, is an overtime statute. Overtime laws fall into

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of their tours of duty the preceding Wednesday. If notified after Wednesday, **employees required to work outside their regular schedules** shall be compensated at the overtime rate if permitted by law . . . Temporary changes shall be reviewed each week. If a temporary change continues beyond two consecutive weeks, the exclusive organization may consult with the installation head to ascertain the reasons and expected duration.—"
(Referred to by Court of Appeals, Pet. pp. 15, 16 and see ftn. 4, p. 16 of Petition).

[9] Sec. 5 of P. L. 89-301 created a new and comprehensive design whereby initially the petitioner was required for the first time to "establish" regular work schedules (39 U. S. C. (Supp. IV) 3571), and, in Sec. 3573, to pay overtime rates for overtime work.

[10] In **U. S. v. Gates**, the Supreme Court held that the Postmaster General must pay overtime for hours over eight in one day as the law required, and could not pay for it by sending employees home early on Sundays and holidays and by this device avoid the directive of the statute by averaging out the hours on a weekly basis.

the category of social legislation which requires a liberal interpretation to effect its purposes. **U. S. v. Silk**, 331 U. S. 704 at 712, 91 L. ed. 1757 at 1767, 67 S. Ct. 1463.

Furthermore the principle that employers may not develop **ingenious** plans and devices to deprive employees of their statutory rights under overtime statutes is well settled not only in U. S. v. Gates, supra, but also in cases arising under the Fair Labor Standards Act (e. g. **Walling v. Helmrick & Payne, Inc.**, 323 U. S. 37, 65 S. Ct. 11, 89 L. ed. 29).

The statutory language is precise and uses language well known in the field of overtime practices both in the public and private sectors. The legislative history has also made clear that Congress intended to modernize the over time practices which prior to October 1965 were nonexistent in the Post Office Department except for the month of December (supra ftn. 5 p. 3).[11] The language selected made clear the intention of the legislators as expressed in the legislative history; that is, employees were to have a "regular predictable schedule" (Pet. p. 22) and were to be paid a premium rate when they worked outside of the regular scheduled hours which the Department was required to establish. This was made pointedly clear in the use of a different terminology in defining "overtime work" for "annual rate regular employees", as distinguished from "hourly rate regulars" and "substitute employees" (5 U. S. C., Supp. IV, 3573 (a) (1), (2), (3), Pet. p. 3).

Had the Postmaster General's interpretation been allowed to prevail, not only would there be no distinction between the various categories of employees, as Congress specifically provided, but the regular rate annual em-

[11] While it is difficult to conceive that one of the largest employers in the Western World would by 1965 not have established regular days of work and regular days of rest on which his employees could rely, it is even more inconceivable that in 1969 he would still continue to resist such modernization.

ployees would be in exactly the same position which prevailed under the abandoned compensatory time off statute which preceded the amendments.[12] It cannot be assumed that Congress, after extensive hearings and after expressing an intention to bring the regular rate postal employees in line with practices which prevail not only for regular Civil Service employees, but for private industry as well, enacted a law which places the postal employees in a position even worse than before—for to do so would be to assume that Congress intended a nullity or was hoodwinking the postal employees (Pet. p. 22, ftn. 21).

The second point made by Petitioner,[13] the cost involved, is not worthy of a great Department of this government.

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[12] The pertinent provision of Title 39, U. S. C., 1964 ed. 3573 prior to the amendment of 1965 read as follows:

> § 3573. Compensatory time, overtime, and holidays.
>
> "In emergencies or if the needs of the service require, the Postmaster General may require employees to work more than eight hours in one day, or on Saturdays, Sundays or holidays. For that service he shall grant employees in the 'PFS' Schedule compensatory time or pay them overtime compensation under the following rules:
>
> (1) Each employee in or below salary level PFS-7 shall be paid for all work in excess of eight hours in one day at the rate of 150 per centum of his hourly basic compensation.
>
> (2) Each employee in or below salary level PFS-7 who performs work on Saturdays or Sundays shall, under regulations prescribed by the Postmaster General, be granted compensatory time in an amount equal to the excess time worked within five working days, except that, in lieu of such compensatory time, the Postmaster General may, if the exigencies of the service require, authorize him to be paid, for work performed on Saturdays and Sundays during the month of December, at the rate of 150 per centum of his hourly basic compensation."

[13] Petitioner speaks of a "forty per cent" overtime rate on page 6 of his Petition. Respondent assumes that this is a typographical error and in any event they are not aware of any basis for that figure arising from the decision of the Court of Appeals.

The violations, as the record shows, were made deliberately in the face of constant protest, orally and in writing by the Federation and by individual employees, in grievance processing and by litigation beginning in the Groettum case within 10 days after the violation (his grievance was filed July 1, 1966). Consequently, the Postmaster General should not at this late date begin to worry about the extent to which he has deprived his employees of their statutory rights. Whatever overtime costs would evolve from violations were facts ascertainable at the time the unlawful program was innovated in 1966. Surely, if he were deeply concerned about money, Petitioner would not have waited 120 days to file his petition in this court. Although the amount, whether great or small, is not a matter going to the question of whether petitioner can ignore an Act of Congress, respondent believes it appropriate to point out that there is no word or figure in the record in this case to support the "scare figures"—this suit is concerned only with bringing petitioner into compliance. Finally, as the Court of Appeals spelled out, the Petitioner may reduce the cost of overtime by employing substitutes and hourly rate regular employees (Pet. p. 22).

## CONCLUSION.

The Petition for a writ of certiorari should not be granted.

Respectfully submitted,

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